

Employee Benefit Reference

Consider the following procedures at each examination. Examiners are encouraged to exclude items deemed unnecessary. This procedural analysis does not represent every possible action to be taken during an examination. The references are not intended to be all-inclusive and additional guidance may exist. Many of these procedures will address more than one of the Standards and Associated Risks. For the examination process to be successful, examiners must maintain open communication with bank management and discuss relevant concerns as they arise.

GENERAL ADMINISTRATION

1 Determine in what capacities the institution serves, including the following:

- 1 A Trustee.
- 1 B Plan administrator.
- 1 C Participant record keeper.
- 1 D Investment manager.
- 1 E Investment advisor.
- 1 F Named fiduciary. [Note: Other than an own-bank plan, the institution should generally not assume the responsibility and liability of being a "named fiduciary."]
- 1 G Custodian.
- 1 H Agent.

2 Determine if the institution properly documents the administration of employee benefit plans. Consider whether the institution maintains copies of the following:

- 2 A The plan and trust agreement and any amendments, or an adoption agreement for prototype plans. [ERISA 404(a)(1)(D)]
- 2 B The plan sponsor's board resolution adopting the plan and any subsequent amendments.
- 2 C The Internal Revenue Service's determination letter qualifying the plan for tax deferred contributions. (Note: Prototype plans may maintain a centralized determination letter.)
- 2 D Co-fiduciary approvals for investments or other actions as needed.
- 2 E The plan's adoption of any collective investment funds. [Revenue Ruling 81-100] (Refer to Pooled Investment Vehicle Module)
- 2 F Documents evidencing appointment and specimen signatures of those individuals authorized to direct the institution (i.e. plan sponsor, plan administrator, investment manager, third party service providers etc).
- 2 G Written authorizations for benefit payments, participant loans, and other actions.
- 2 H Written investment directives, if the institution does not have investment authority.

- 3 Determine whether the institution inappropriately relies on exculpatory provisions which attempt to relieve a fiduciary from liability. [ERISA 410]
- 4 Determine if fees charged by the institution are in accordance with governing documents, fee agreements, or the institution's fee schedule and are collected at appropriate intervals.
- 5 Determine if synoptic records, or other electronic account information, are accurate and adequately summarize the governing documents.
- 6 Determine if a tickler system establishes reminders for all significant events.
- 7 . If the institution administers plans for which it is responsible for preparing or distributing the Summary Plan Description (SPD), determine whether:
 - 7 A The SPD accurately reflects the provisions of the plan.
 - 7 B A copy of the SPD is provided to plan participants in the following circumstances:
 - 7 B1 Upon initial participation in the plan.
 - 7 B2 After significant plan changes.
 - 7 B3 At least once every five years.
- 8 Evaluate the services provided by the sponsor of any prototype plan documents used by the institution, including updates and training.
- 9 Determine if the institution has any co-fiduciary liability. [ERISA 405] Consider the following:
 - 9 A Knowingly participating or undertaking to conceal a breach by another fiduciary.
 - 9 B Failing to act prudently which enables another fiduciary to commit a breach.
 - 9 C Failing to make reasonable efforts to remedy a breach, that such fiduciary has knowledge of, by another fiduciary.
- 10 Determine if plans are administered for the exclusive benefit of the plan participants and beneficiaries and for defraying reasonable expenses of administering the plans. [ERISA 404(a)(1)(A)]
- 11 Determine if the institution acts with care, skill, prudence and diligence when acting as a fiduciary to plans. [ERISA 404(a)(1)(B)]
- 12 Determine if plans are administered in accordance with the governing documents. [ERISA 404(a)(1)(D)]
- 13 Determine if the institution has specimen signatures for validating instructions from outside parties.
- 14 Determine if all employee benefit accounts have had an adequate annual administrative and investment review.

Prohibited Transactions

15 Determine if plans have entered into any nonexempt or prohibited transactions [ERISA 407 and 408, and IRC 4975(d)] with parties in interest [ERISA 3(14); ERISA 406(a)] or disqualified persons [IRC 4975(c)(1); IRC 4975(e)(2)]. Consider the following transactions:

15 A Sale, exchange or lease of property. [406(a)(1)(A)]

15 B Lending money or other extension of credit. [406(a)(1)(B)]

15 C Furnishing goods, services or facilities. [406(a)(1)(C)]

15 D Transfer of assets. [406(a)(1)(D)]

15 E Use or benefit derived from plan assets. [406(a)(1)(D)]

15 F Acquisition of employer securities or real estate. [407(a)]

16 Determine if plans have entered into any nonexempt transactions with fiduciaries. [ERISA 3(14)(A); ERISA 406(b); IRC 4975(e)(3)] Consider the following transactions:

16 A Dealing with the plan assets in the institution's own interest or for its own account.

16 B Acting adversely to the interests of the plan or its participants or beneficiaries.

16 C Receiving any consideration from dealing with the plan's assets.

17 Determine if the acquisition of employer securities or employer real property is a prohibited transaction under ERISA 406(a) or IRC 4975(c). [ERISA 407; ERISA 408(e); DOL 2550.408e; IRC 54.4975-12] Consider whether at the time of acquisition:

17 A The purchase did not exceed limits established by the plan.

17 B The purchase did not exceed ten percent of the fair market value of plan assets, if the plan does not otherwise set a limit. (Note: The ten percent limit may be exceeded in eligible individual account plans, such as ESOPs, stock bonus plans, and others, if plan documents specify other limits.)

17 C Employer real property is geographically dispersed and suitable for more than one use.

18 Determine if investments in proprietary mutual funds comply with PTE 77-4. (Refer to Pooled Investment Vehicles module.)

19 Determine if the institution receives any compensation or fees from plan assets. [ERISA 406(b)] Consider the following:

19 A 12b-1, shareholder or participant record keeping fees from mutual funds. (Refer to Pooled Investment Vehicles module)

19 B Soft dollars on securities transactions that do not meet the safe harbor requirements of SEC 28(e).

19 C Sweep fees in discretionary accounts. [AO 86-FRB; AO 88-02A]

20 Determine if overdrafts in employee benefit accounts comply with PTE 80-26.

21 Determine if own-bank deposits qualify for an exemption from ERISA §406. [ERISA 408(b)(4)] Consider the following requirements:

- 21 A The deposits bear a reasonable rate of interest.
- 21 B The plan covers only bank and affiliate employees.
- 21 C The deposits are expressly authorized.
- 22 Determine if the following investments qualify for an exemption:
 - 22 A Insurance or annuities. [ERISA 408(b)(5)]
 - 22 B Collective investment funds or certain pooled investment funds. [ERISA 408(b)(8); IRC 4975(d)(8); PTE 91-38]

Plan Assets

- 23 Determine if plan assets are adequately diversified unless clearly prudent not to do so [ERISA 404(a)(1)(C)] or unless plan participants direct the investments [ERISA 404(a)(2)].
- 24 Determine if third party investment managers acknowledge in writing that they are a fiduciary to the plan.
- 25 Determine if the assets of discretionary accounts are invested in accordance with:
 - 25 A The plan's funding policy and investment objectives.
 - 25 B Any unique investment provisions contained in plan documents.
 - 25 C The institution's investment policies.
- 26 Determine if investments in repurchase agreements, banker's acceptances or commercial paper comply with the provisions of PTE 81-8 (Short-term investments).
- 27 Determine whether real estate is properly administered. Consider the following:
 - 27 A Perfection of title to the property.
 - 27 B Performance of annual inspections.
 - 27 C Evaluation of potential environmental liability.
 - 27 D Adequacy of insurance showing the trustee as loss payee.
 - 27 E Payment of real estate taxes.
 - 27 F Maintenance of the property in good condition.
- 28 Determine if non-publicly traded assets are properly valued. [Revenue Ruling 59-60; ERISA 404(a)(1)(B)] Procedures may include:
 - 28 A Annual appraisal of assets by an independent third party.
 - 28 B A reasonable method for valuing assets held in individual or segregated account plans.

28 C Reasonable methods for determining the fair market value of qualifying employer securities and real estate.

Participant Loan Administration [ERISA 408(b); IRC 4975(d); DOL 2550.408b-1]

29 Determine if the institution is authorized to approve participant loans or maintains written directives from authorized parties.

30 Determine if loans are available to all participants on a reasonably equivalent basis.

31 Determine that loans are not available to highly compensated employees in amounts greater than other employees.

32 Determine if plans contain specific provisions for administering loan programs, including the following:

32 A Identity of the person or position authorized to administer the loan program.

32 B Procedures for applying for loans.

32 C Basis on which loans will be approved or denied.

32 D Any limitations on the types and amount of loans offered.

32 E Procedures for determining a reasonable rate of interest.

32 F Types of collateral that may secure a loan.

32 G Events constituting default and the steps that will be taken to preserve plan assets in the event of default.

33 Determine if loans bear a reasonable rate of interest and comply with the plans' established loan program.

34 Determine if loans are adequately secured.

35 Determine if the institution maintains adequate policies governing the administration of participant loans.

36 Determine if participant loans comply with IRC provisions, including Section 72(p). Loan restrictions include the following:

36 A Loans to each participant can not exceed a maximum of \$50,000 minus the highest outstanding loan balance during the prior 12-month period.

36 B Repayment is required within five years, except for loans used to acquire a principal residence.

36 C Loans require substantially level amortization, with payments required at least quarterly.

37 Determine if spousal consent is obtained when necessary. (IRC 417(4))

38 Determine if loans not complying with the IRC have appropriately been deemed as taxable distributions. [IRC 72(p)-1] Consider the following events that could necessitate a deemed distribution:

- 38 A Loans exceed the maximum repayment terms.
- 38 B Loans are not evidenced by an enforceable agreement.
- 38 C Any portion of a loan in excess of the \$50,000 maximum.
- 38 D Loan payments are not received at least quarterly, unless the plan has adopted a grace period (not to exceed the last day of the calendar quarter following the calendar quarter in which the required payment was due).
- 39 Determine if participants are provided Form 1099 for the tax year in which a loan is deemed a distribution. [Note: Form 1099 does not have to be provided until January 31 of the year following the taxable event.]
- 40 Determine if the institution provides adequate records for loans deemed as distributions in prior years.
- 41 Determine if loans deemed as distributions remain as plan assets until such time as the plan allows for in-service withdrawal or actual distribution.
- 42 Determine if prohibited loans have been made to an "owner-employee" who is a sole proprietor, a 10 percent or more partner in a partnership, or a five percent or more owner of a Subchapter S Corporation. [ERISA 406(a) and 408(d); IRC 4975(c)]
- 43 Determine if the loan program complies with applicable consumer protection laws and regulations, including FRB Regulation Z, Truth in Lending. (Note: Truth in Lending disclosures should be provided to participants in plans that originate 25 or more consumer loans, or 5 or more loans secured by a residence.)

Participant Record Keeping

- 44 If the institution performs participant record keeping services, determine whether:
 - 44 A Record keeping is performed for all types of plans.
 - 44 B The institution only performs record keeping services for plans where it serves as trustee.
- 45 Determine if a separate agreement delineates the duties and responsibilities relating to participant record keeping.
- 46 Determine if comprehensive policies and procedures are maintained for participant record keeping activities.
- 47 Determine if managers and employees have the necessary expertise and specialized training in participant record keeping.
- 48 Assess quality control or other review procedures for participant record keeping activities.
- 49 Review customer complaints relating to participant record keeping.
- 50 Determine if appropriate procedures are in place to monitor the receipt of timely employer contributions and employee salary deferrals.

- 51 Determine if audit procedures include a review of participant record keeping.
- 52 Determine if items maintained in suspense accounts are reviewed frequently and cleared in a timely manner.

Securities Lending

[Refer to the Interagency Policy Statement on Securities Lending.]

- 53 Determine if securities lending arrangements are governed by a written agreement.
- 54 Determine if financial information is obtained from borrowers and if a credit analysis is performed prior to entering into any securities lending arrangement.
- 55 Determine if the collateral received from borrowers consists of cash, government securities or irrevocable bank letters of credit, the fair market value of which is at least 100 percent of the market value of the borrowed securities.
- 56 Determine if collateral margins are monitored and maintained for the duration of the loan.
- 57 If securities lending arrangements involve parties in interest, determine whether the borrower or any affiliate of the borrower has discretionary authority or control with respect to the investment of plan assets or renders investment advice to the plan. [ERISA 406(a)] [PTE 81-6]
- 58 Determine if plans continue to receive dividends, stock splits, etc. during the term of the loan.
- 59 Determine if plans receive a reasonable fee relative to the value of the borrowed securities and the duration of the loan, or that plans have the option of investing cash collateral.
- 60 Determine if compensation for services rendered in connection with securities lending complies with PTE 82-63.

NOTE: In addition to the general administrative procedures contained above, consider the following for specific account types.

Employee Stock Ownership Plans (ESOP)

- 61 Review employer stock purchases. Consider the following:
 - 61 A The investments are prudent and in compliance with the plan documents. [ERISA 404(a)(1)(B); 404(a)(1)(D)]
 - 61 A1 If investments are not considered prudent, determine if the plan requires investment in employer securities or only permits such investments.
 - 61 B Not more than "adequate consideration" is paid. [ERISA 3(18); ERISA 408(e); DOL 2550.408e(d); DOL 2510.3-18(b)]
 - 61 C No direct or indirect commissions are paid to parties in interest. [ERISA 408(e)(2)]
- 62 Determine if valuation practices for employer stock are adequate. [ERISA 404(a)(1)(B)]
Consider the following:
 - 62 A Review valuation reports of third party appraisers.
 - 62 B Assess the independence of third party appraisers.

- 62 C Determine if adequate documentation is maintained.
- 63 Determine if any stock purchases were made from or through a disqualified person. [IRC 4975(e)(2)]
 - 63 A Determine if the fair market value of the stock was documented as of the date of the transaction. [IRC 54.4975-11(d)(95)]
- 64 Determine if loans to purchase qualified employer securities: [ERISA 406, 407, 408(b)(3); IRC 4975(d)(3); DOL 2550.408b-3]
 - 64 A Were for the primary benefit of the plan participants and beneficiaries.
 - 64 B Bear a reasonable rate of interest.
 - 64 C Are payable over a specified term and not payable on demand, except in the event of default.
 - 64 D Were used exclusively to purchase qualified employer securities or repay a prior exempt loan.
 - 64 E Are collateralized only by the employer securities.
 - 64 F Do not include recourse against the plan other than the pledge of the securities acquired.
 - 64 G Provide that the purchased securities will be released from encumbrance as provided in DOL 2550.408b-3(h).
 - 64 H Comply with the provisions of the plan documents. [ERISA 404(a)(1)(D)]
- 65 Review the procedures for maintaining a suspense account for employer securities purchased but not yet allocated to participants. [IRC 54.4975-11(c)]
 - 65 A Review the sufficiency of accounting procedures and records.
 - 65 B Determine if voting procedures for unallocated shares are in accordance with the plan documents.
- 66 Determine if voting rights are passed through to the participants for those shares allocated to individual accounts. [IRC 409(e); SEC 240.14c-7]
- 67 Evaluate potential conflicts of interest when the institution acts both as trustee and lender to a plan.

Own-Bank Plans

- 68 Review board or committee minutes relating to the operation of the plans.
- 69 Determine if plans have been amended since the previous examination and that appropriate documentation of such amendment has been maintained.
- 70 Determine if plans provide a put option for the following: [IRC 54.4975-11; DOL 2550.408b-3]
 - 70 A Non-publicly traded employer securities purchased with an exempt loan.

- 70 B Employer securities subject to a trading limit when distributed.
- 71 Determine if affiliate or covered transactions comply with FRB Regulations 23A and 23B.
- 72 Determine if the institution refrains from charging fees other than direct costs and expenses. [AO79-49]
- 73 Determine if the plan is covered by fiduciary liability insurance and the amount of any such insurance. [ERISA 410]
- 74 Review the most recent top heavy and nondiscrimination test results for compliance with IRC requirements.
- 75 Review the most recent Summary Plan Description and determine if it accurately reflects the governing plan documents.
- 76 Determine if directives from plan participants are implemented in a timely manner and in accordance with plan documents. [ERISA 404(a)(1)(B) and (D)]
- 77 Determine if fiduciaries to the plan, other than the institution or plan sponsor, are bonded. [ERISA 412]
- 78 Review the most recent Form 5500 to determine if the institution is properly reporting plan assets, including participant loans.

Defined Benefit Plans

- 79 Review the most recent actuarial report to determine whether plans are over- or under-funded.
- 80 Determine if a funding policy has been established and complied with.
- 81 Review agreements with outside investment managers and the procedures used to monitor their performance.

Individual Account/Participant Directed Plans

- 82 Determine whether plans operate in conformance with DOL 2550.404c-1 in order to limit fiduciary responsibility and liability for participants or beneficiaries who can exercise control over assets. [ERISA 404(c)] Consider the following requirements:
- 82 A Plan documents clearly state that the plans are intended to constitute an ERISA 404(c) plan, and that fiduciaries will be relieved of responsibility for investment losses.
- 82 B Participants are provided at least three investment alternatives, each of which is diversified and has materially different risk and return characteristics.
- 82 C Participants are allowed to give investment instructions not less than quarterly on at least three investment options and more frequently for more volatile investments.
- 82 D Participants are provided sufficient information to make informed investment decisions.
- 82 E Participants are given a description of fees and expenses chargeable against their accounts.

82 F Plan fiduciaries appropriately select and monitor investment options to ensure that they are prudent choices for the plans.

Deferred Compensation/Excess Benefit Plans

83 Determine whether plans are "nonqualified" and, therefore, not subject to ERISA. [ERISA 3(36); 401(a)(1)]

83 A Determine if plans are "unfunded." (Note: Plans are generally "unfunded" if the assets in the plan could be available to pay the employer's general creditors in the event the employer becomes insolvent.)

83 B Review nonqualified plans for prudent administration.

Self-employed Retirement Plans [KEOGH or HR-10]

84 Determine if accounts which cover only the "owner-employer" comply with the prohibited transaction provisions of ERISA 406 and IRC 4975.

85 Determine if accounts covering both the "owner-employer" and other employees comply with ERISA 404, ERISA 406 and IRC Section 4975.

86 Determine whether accounts hold any collectibles or coins that should be treated as distributions. [IRC 408(m); PTE 91-55]

87 Determine whether accounts are invested in the bank's collective investment funds. (Refer to Pooled Investment Vehicle Module)

Individual Retirement Accounts

88 Determine if the fair market value of all assets has been reported annually, including limited partnerships, real estate, and other non-publicly traded assets. [IRC 408(i)]

89 Determine whether accounts hold any collectibles or coins that should be treated as distributions. [IRC 408(m); PTE 91-55]

90 Determine whether accounts have entered into any prohibited transactions with a disqualified person. [IRC 4975 and DOL AO 89-03]

91 Determine if investments in proprietary mutual funds comply with the PTE 77-4. [AO 93-26A]

92 Determine if accounts are invested in the bank's collective investment funds. (Refer to Pooled Investment Vehicle Module.)

Terminating Plans

93 Determine if an IRS determination letter is received prior to final termination and distribution of plan assets.

94 Determine if assets have been distributed or appropriately transferred in a timely manner.

95 Determine if the institution is making reasonable efforts to locate any lost participants.